SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 53

WILLIAM EARL FIKES,

Petitioner,

v.

STATE OF ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the Supreme Court of Alabama is reported at 81 So. 2d 303.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered on May 12, 1955. Petition for rehearing was denied June 23, 1955. On September 14, 1955, by order of Mr. Justice Black, the time within which to file a petition for writ of certiorari was extended to and including November 20, 1955. The petition and motion for leave to proceed *in forma pauperis* were granted on March 26, 1956. The record was received by petitioner on September 11, 1956.

The jurisdiction of this Court rests on 28 U. S. C. 1257(3), petitioner having asserted rights, privileges and immunities conferred by the Constitution and statutes of the United States.

Questions Presented

I

A

Whether sentence to death of petitioner solely on the basis of two alleged confessions exacted during ten days of incarceration while held on an "open charge of investigation" in the State Penitentiary, during which time he was without advice of counsel, friends or family and was incessantly questioned by police, denied due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

B

Whether under these circumstances due process was denied when petitioner offered to testify on *voir dire*, during the State's case, solely for the purpose of showing that the confessions were not voluntary and the Court held that petitioner would be required to respond to all questions concerning his guilt or innocence.

II

Whether petitioner was denied rights guaranteed by the Fourteenth Amendment when indicted in a county where Negroes are more than 50% of the population and no Negro has ever served on a grand jury; and where the panel of 1,750 persons selected immediately preceding petitioner's indictment contained approximately 250 Negroes placed thereon specifically because of their race; and where a substantial number of exempt white persons were called for jury duty, but exempt Negroes were not.

Statement

Events Preceding Petitioner's Arrest

Petitioner was convicted of the crime of burglary in the first degree (with intent to rape) and sentenced to death therefor in the Circuit Court of Dallas County, Alabama, on December 10, 1953 (R. 112). The judgment was affirmed by the Supreme Court of Alabama (R. 353). Petition for writ of certiorari and motion for leave to proceed *in forma pauperis* were granted by this Court on March 26, 1956. (100 L. ed. Adv. p. 408).

During early 1953, a number of crimes were committed in the City of Selma, Alabama, involving rape, house breaking and burglary. On April 24, 1953, an intruder entered the home of Mrs. Jean Heinz Rockwell, daughter of the city's mayor (R. 181). Mrs. Rockwell awoke to find the burglar sitting on her (R. 183) holding a knife at her throat (R. 186). A violent struggle followed which carried Mrs. Rockwell and her assailant more than forty feet through the apartment (R. 185), and ended by Mrs. Rockwell seizing the knife (R. 186) and routing him from the premises. However, she was at no time able to identify him, even though the bedroom, living room and hall were all illuminated (R. 185), because "a towel [was] draped over his head" (R. 186).

The Captain of the Selma Police Department affirmed that the Police Department of the City of Selma was "under unusual pressure" to apprehend the perpetrator of these offenses (R. 244).

Petitioner's Arrest

About a month later, a few minutes after midnight on Sunday morning, May 17, a civilian (not a member of the police force) apprehended petitioner who was walking through an alley of the City of Selma (R. 269); petitioner

was soon turned over to the police who took him to the Selma police station (R. 268).

Petitioner is a 27 year old Negro who left school at the end of the third grade when he was 16 years of age (R. 307). There was uncontradicted testimony by two psychiatrists employed by the Veterans Administration and a Veterans Administration physician specializing in psychiatry, that petitioner was seriously mentally ill (R. 282-298). They had examined petitioner and concluded that he was suffering from the disease of schizophrenia (R. 285, 290, 295). Petitioner's mother testified that he had always been "thick-headed" (R. 308).

Petitioner was held "on an open charge of investigation" (R. 194).

The Captain of Selma's police testified that on the day following petitioner's arrest a warrant was issued for him (R. 195), but not recorded as is customary when arrests are made in the city (R. 222). At no time was a charge entered against petitioner on the Recorder's docket of the City of Selma (R. 196), the procedure where arrests are made in the city (R. 222).[1]

Petitioner's "Protective Custody"

Not long after his arrest defendant spoke to his employer (R. 205) and to the Sheriff of Perry County, Marion, Alabama. But immediately thereafter the Selma police made several trips with petitioner (R. 244) back and forth to Kilby State Penitentiary, more than fifty miles from Selma, and deposited him there (R. 244). There, the Kilby Warden

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[1] Numbered warrants were issued for all arrests made in the city (R. 222). Petitioner's was seemingly one of the cases about which the chief of police was "not just particularly clear" (R. 222), in which sometimes numbered warrants are not issued and no record is made on the Recorder's docket.

stated, "as a safekeeper, he is not our prisoner, so we never feel like we can let anyone see him without getting an OK from the man who has charge of him" (R. 325). An apparent exception might be made for "a man [who] identifies] himself as a lawyer . . ." (R. 325). But, solely because he was in the custody of Kilby a member of the bar who came to see petitioner "because he didn't think he was guilty" (R. 331) was refused access to him prior to his confession. Under identical circumstances a lawyer was permitted to see petitioner subsequent to his confession.[2]

Defendant was taken to Kilby not because threats had been made against him by individuals or groups either inside or outside of the Selma jail (R. 207-208), but solely for "protection, protective custody" (R. 207).

Incarceration and Interrogation Preceding "Confession"

So far as material to the confession issue, petitioner was in the custody of police from Sunday, May 17 through Tuesday, May 26. All of this time from around noon, Monday the 18th, was spent at Kilby. The interrogations took

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[2] The record on this point indicates that on the Saturday following the Thursday confession, John McGee, Esq., a practicing attorney of Montgomery, made an effort to see petitioner, but was sent away by the Warden (R. 324). The reasons for refusing him access were, as the Warden stated, "he refused to identify himself as an attorney." However, in response to the next question the Warden replied that he did identify himself "orally" and that the Warden knew of him (R. 325). The Warden then testified that Mr. McGee did inform that he was a practicing attorney, but "didn't say where his office was" (R. 325). On redirect examination by the solicitor the Warden testified that he does not "permit lawyers who have not been retained by the prisoner or his family to solicit . . . " and that Mr. McGee did not inform the Warden that he had been retained by the family (R. 331).

When defendant's present counsel appeared to see him—after he had confessed—they identified themselves to no greater extent than did Mr. McGee and there was no more inquiry by the Warden into their authority to see the prisoner "any more than the man out there said they were lawyers" (R. 333). This was because he was their "own prisoner" and "we can let anybody see him that we want to" (R. 333).

place at the following times and under the following circumstances:

Sunday, May 17: Questioning by Captain Baker 10:00 a.m., to 12:00 noon (R. 210).[3]

Thereafter police drove petitioner around the city to view alleged scenes of crimes (R. 216).

That afternoon petitioner was questioned two and a half or three hours (R. 211).

Monday, May 18: Petitioner was interrogated from 9:00 a.m. to 11:00 a.m. (R. 211). Petitioner was then driven by three police officers (R. 208) to Kilby and back again "several times" (R. 244) and left at Kilby (R. 200, 201, 211, 212). Kilby is fifty-five miles from Selma (R. 244) and eighty or ninety miles from petitioner's home in Marion. Captain Baker apparently questioned petitioner while they were driving (R. 212, 244).

Monday afternoon, May 18: Petitioner was questioned "several" hours (R. 212).

Tuesday, May 19: Petitioner was kept in "segregation" (R. 323-324).[4]

Wednesday, May 20: Petitioner was questioned for a "little while" in the morning (R. 212).

That afternoon he was questioned for "several" hours the conversation ending not "too late" that "evening" (R. 212-213).

Thursday, May 21: Petitioner was questioned for about

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[3] Captain Baker testified that "I would usually start off the conversation each time, and I'm sure some of the witnesses heard me advise the defendant that he was entitled to counsel and his various rights" (R. 214). He also testified that to his knowledge petitioner had not been threatened, nor had any hope of reward been held out to him (R. 191).

[4] The Warden explained that this was not "solitary confinement" in the sense that it was ordered for punishment, but merely to safeguard the prisoner. He was not allowed to mingle with other prisoners (R. 324).

two hours in the afternoon (R. 214). That evening he was questioned for about one and one half hours (R. 214-215).[5]

These interrogations were attended by Captain Baker who did most of the questioning (R. 213) and by Sheriff McCain, Lt. Ware, Mr. Hare (the Circuit Solicitor), Mr. Reese (the County Solicitor), Dr. Sowell (the State Toxicologist) and Mr. Burford (Kilby's Warden) (R. 213-214). Captain Baker asked most of the questions (R. 213). The others—all of whom were not present at all times—also participated (R. 214-215), although the Warden perhaps did not (R. 214).

On Thursday petitioner made the first alleged confession in this case (R. 323-326).

At the time of this confession petitioner had been held in custody for five days and subjected to approximately twenty hours of interrogation.[6]

Petitioner's father went to Kilby on the Thursday that the confession was made, but was unable to see his son until Sunday (R. 304).

Following the Thursday confession, which was tape recorded (R. 232-236) interrogation of petitioner continued.

On Friday, May 22, he was confined in his isolated cell.

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[5] The statements about matter of fact in the text are all uncontradicted. There is, in addition, conflicting testimony that the interrogation immediately preceding the Thursday confession lasted 9 hours. A story in the *Selma Times-Journal* stated "The Perry County negro, who was picked up on suspicion last Saturday night, broke down at 6 p.m. yesterday and made his complete confession to Captain Wilson Baker after a 9-hour questioning session" (R. 248). The entire article appears at R. 327. Captain Baker denied that he gave this information to the reporter (R. 248) and it was also denied that any other state officer furnished this information. The reporter who wrote the story testified that he obtained the information therein from the Selma police (R. Original 773, 774). But on cross examination by the Solicitor the reporter testified that the figure of "9 hours" was based purely upon "assumption." (R. Orig. refers to the typewritten Record).

[6] Petitioner uses the term "approximately" for the reason that "several" may mean two or more hours, perhaps substantially more. Twenty hours is probably a conservative estimate.

On Saturday, May 23, he was questioned for three and one half hours. This is the day that John McGee, Esq., of Montgomery, attempted to see petitioner, but was refused access to him.[7]

On Tuesday, May 26, petitioner was questioned for three and one half to four hours (R. 316) following which a second confession, in writing, was obtained.

By this time prisoner had been in custody for almost ten full days and had been subjected to at least twenty-seven hours of interrogation. He was indicted on at least six charges of first degree burglary although in this case he was tried only for one (R. 346, 340).

Motion to Quash

Before trial petitioner filed motions to quash the indictment on the ground that Negroes were systematically excluded from grand and petit juries in Dallas County, Alabama, contrary to the Fourteenth Amendment to the United States Constitution (R. 4, 8). On this issue one witness, a practicing attorney in Dallas County since 1903, who had a large criminal practice testified that he had never "seen a Negro serve on either a grand jury or a petit jury" (R. 29).[8]

No Negro sat on the grand jury which convicted petitioner (R. 68).

The jury roll in this case was prepared after petitioner had successfully prevailed on an earlier motion to quash (R. 340). The Jury Commissioners, between October 5 and 17, 1953 (R. 72-73) made up a new jury roll. A Commissioner

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[7] See footnote 2, *supra*.

[8] Another witness in practice for 20 years had never known a Negro to serve on a Grand Jury (R. 37). All of the lawyers including the Circuit Solicitor who had been in office since 1946 testified that they had never known a Negro to serve on a Dallas County or petit jury, although they knew of some who had been on the venires (R. 27-66).

testified that the new roll contained the names of approximately 1500 white persons and 250 Negroes, although the three Commissioners were able to identify but 50 (R. 160), 177 (R. 159) and 190 (R. 167) Negroes, respectively, on the rolls (R. 77-78). The Commissioners used personal contacts, the city directory, the telephone book and personal knowledge to make up the roll (R. 78), but impersonal sources were employed only insofar as the Commissioners were personally acquainted with the persons listed therein (R. 79). In addition to individuals whom the Commissioners knew they "asked prominent men within the community to offer us the names of qualified Negroes to be placed in the box" (R. 81). At the time each name of a Negro was placed in the box he was known to be a Negro (R. 80). They asked two Negroes for names, but they furnished nothing (R. 105).

The Chairman explained the exclusion of Negroes otherwise qualified for service by stating that the Commission did not list persons in certain occupations who were exempt from service by statute, if they chose to claim their exemption (R. 112).

A substantial number of qualified Negroes were never called; many of them were exempt but did not receive the option of declining to claim their exemption. These included a college president (R. Orig. 110), a former college president, graduate of Brown University, and member of Phi Beta Kappa, who had lived in Dallas County 60 years (R. Orig. 227-229), a Presiding Elder of the AME Church (R. Orig. 181), dentists, teachers, physicians, businessmen, laborers, mail clerks, mail carriers, and farmers, all of them residents of Dallas County, Alabama (R. Orig. 110-366).

But while the names of Negroes who might claim exemption were not included at least 15 exempt white persons were included (R. 138-145, 149, 152-153, 156).

The Trial

The motion to quash was overruled and petitioner went to trial. At the trial the evidence that petitioner had committed the crime for which he was being tried consisted solely of the confessions discussed *supra*. Petitioner objected to their admission on the ground that they had been obtained in violation of rights guaranteed by the Fourteenth Amendment. (R. 91-192, 203-230, 258).[9]

Petitioner's motions were overruled by the trial court.

Petitioner also offered to take the stand for the purpose of proving the involuntary nature of the "confession" and for no other purpose; this offer was refused (R. 230).[10]

Neither prosecutrix's testimony, nor any other evidence

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[9] "Attorney Hall: If your Honor please, we now object to the introduction in evidence of this alleged whatever it is, sir—this paper, these five separate sheets of paper bound together with a Gem clip—on the grounds they have not been properly identified, sufficient predicate has not [fol. 609] been laid, it has not been shown who executed them, and the paper does not indicate when it was executed, and there is no way in the world to tell whether this is the entire whatever it purports to be or not, sir, and that it is incompetent for any purpose; and on the grounds that whatever statements may or may not be on this particular paper were extorted from him under duress because of violence, threats of violence, incarceration in the penitentiary and in the City jail, constant questioning—it has been indicated that some of the questioning went as long as nine hours—and that it serves no purpose and is illegal; and that it was taken from this defendant, if taken at all, in violation of all of his rights under the laws and constitution of the State of Alabama and under the Fourteenth Amendment to the Constitution of the United States, and that he suffered a loss of equal protection of law as guaranteed to him under the constitution of our State and the Fourteenth Amendment to the Constitution of the United States of America." (R. 258)

[10] "Attorney Hall: We would like to make an offer to put this defendant on the stand for the purpose of refuting certain allegations by the State with reference to the voluntary nature of what purports to be certain extra judicial admisssions, and for no other purpose.

"Solicitor Hare: Now, may it please the Court, if the defendant takes the stand, I insist that he be subject to cross-examination on any and every item that is in evidence. I am not willing to make any agreement of limitation." (R. 230).

pointed to petitioner as the invader of prosecutrix's home. Besides the confessions, the State's case consisted solely of the testimony of two white women (R. 263, 264) that petitioner had invaded their homes in March and May of 1953 (R. 264-265).[11] This testimony was admitted for the purpose of indicating petitioner's "intent". (Opinion of the Supreme Court of Alabama, R. 351).

Defendant's defense consisted of testimony by his employer (R. 271) and his employer's general manager (R. 275), that defendant had worked until an hour that would have made it impossible for him to be at the scene of the alleged crime at the time it occurred. There was also character testimony on behalf of defendant (e.g. Orig. 647, 649). In the alternative, defendant proffered a defense of insanity (R. 282, 287, 292).

Petitioner was convicted of the crime of burglary in the first degree and sentenced to death.

Opinion of Supreme Court of Alabama

The Supreme Court of Alabama affirmed, holding as to the jury point, "The evidence does not show that some Negroes as well as whites who were competent to serve and not exempt were not put on the roll. It may be Negroes were systematically omitted prior to the roll made in October 1953, but that was not true in making up that particular roll" (R. 345).

The Supreme Court of Alabama held as to the confession point that the confession was not coerced. "The evidence was without conflict that it was voluntary. The authorities sustain our view that questioning a suspect in custody of the law is not prohibited by common law or the Constitution (nor by statute, we may add), and a confession so obtained

[11] One of these women was able to identify petitioner by his "eye" R. Orig. 622.

is not for that reason alone rendered inadmissible.—*Phillips* v. *State*, 248 Ala. 510, 28 So. 2d 542. In this case the evidence showed without conflict that the officers did not intimidate appellant in any way. They were not armed when he made the recorded statement. He was in prison under protection against possible attack by others. But there was not shown to be threats of violence by the public or unusual excitement." (R. 349).

As to petitioner's objection that he was denied the right to controvert the state's evidence, the court held that "If he proposed to testify to facts showing that the confession was unduly influenced, he certainly ought to respond to questions as to his guilt in fact and to any matter relevant thereto" (R. 350). On this point two Justices disagreed with the majority although they do not believe that the error was reversible (R. 352).

ARGUMENT

I

A

Due Process Of Law Was Denied Petitioner An Ignorant, Mentally Deficient Negro When Confessions Were Exacted From Him While He Was Persistently Questioned For Ten Days, On A Capital Charge At Kilby State Penitentiary Where He Was Kept Incommunicado "Segregated" And In "Protective Custody" On An "Open Charge Of Investigation" Following Illegal Arrest.

In this case, the circumstances[11a] preceding the first and second confessions closely resemble in quality and quantity

[11a] Completely detailed description of the Record appears in the Statement, supra.

those which this Court has many times condemned as coercive:

Petitioner is an ignorant, mentally deficient [12] Negro.[13] He was charged with a capital offense which ordinarily excites passions which here were aggravated to the point of placing "unusual pressure" on the police. He was apprehended by citizen's arrest and incarcerated in violation of Alabama law which makes special provision for protecting the rights of an accused following such an arrest.[14] He was held on "an open charge of investigation", and his arrest was not recorded with the Recorder in accordance with usual procedure. He was taken more than 50 miles to the Kilby State Penitentiary and kept in "protective custody," and in "segregation"—not as Kilby's prisoner—but in "safekeeping" in which status no one was permitted to see him without the consent of Selma. There was an apparent exception for counsel—not recognized until after peti-

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[12] Defendant's mental capacity to understand and intelligently conduct himself following arrest has been deemed important by this Court in evaluating whether a confession has been coerced. *Haley* v. *Ohio*, 332 U.S. 596; *Ward* v. *Texas*, 316 U.S. 547, 555; *Harris* v. *South Carolina*, 338 U.S. 68, 70.

[13] This Court gives weight to the fact that defendant is a member of an unpopular racial group in ascertaining whether a confession is coerced. *Chambers* v. *Florida*, 309 U.S. 227, 237, 241; *Ward* v. *Texas*, 316 U.S. 547, 555; *Harris* v. *South Carolina*, 338 U.S. 68, 70, as part of considering his "condition in life" *Gallegos* v. *Nebraska*, 342 U.S. 55, 67. See, Mr. Justice Jackson's dissenting opinion in *Ashcraft* v. *Tennessee*, 322 U.S. 143, 152, 173.

[14] Title 15, Code of Alabama Section 160:

"It is the duty of any private person, having arrested another for the commission of any public offense, to take him without unnecessary delay before a magistrate, or to deliver him to some one of the officers specified in Section 152 of this title, who must forthwith take him before a magistrate."

Among the officers specified in Section 152 are police officers, who did not take petitioner before a magistrate until after 10 days incarceration during which the two "confessions" were exacted.

tioner's "confessions."[15] He was persistently interrogated throughout his illegal detention.[16]

The coercive qualities of petitioner's treatment have been condemned frequently in this Court's opinions. As to the first confession alone, rendered after 5 days of imprisonment, this case closely resembles *Turner* v. *Pennsylvania*, 338 U.S. 62 (1949). Turner, charged with the capital offense of murder, was held illegally incommunicado without being told of his rights or given a hearing, for 5 days during which he was questioned a total of 23 hours, the longest day of questioning consisting of two 3-hour sessions.[17]

As to the second confession in this case obtained after 10

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[15] Holding petitioner incommunicado was contrary to the almost universal rule. See statutes collected in *McNabb* v. *U. S.*, 318 U.S. 332, 342, fn. 7. Although there has been some discussion over whether alone this should vitiate a confession it is a serious factor to be weighed, because, "[t]o delay arraignment, meanwhile holding the suspect incommunicado, facilitates and usually accompanies use of 'third degree' methods. Therefore [this Court] regard[s] such occurrences as relevant circumstantial evidence in the inquiry as to physical or psychological coercion." *Stein* v. *New York*, 346 U.S. 156, 187. See also *Harris* v. *South Carolina*, 338 U.S. 68, 71; *Turner* v. *Pennsylvania*, 338 U.S. 62, 64; *Ward* v. *Texas*, 316 U.S. 547, 555; *Ashcraft* v. *Tennessee*, 322 U.S. 143, 152; *Malinski* v. *New York*, 324 U.S. 401, 412, 417; *Turner* v. *Pennsylvania*, 338 U.S. 62, 66, 67.

[16] Persistent interrogation has been held an important factor in evaluating whether a confession has been coerced, *Chambers* v. *Florida*, 309 U.S. 227, 231; *Ward* v. *Texas*, 316 U.S. 547, 555; *Ashcraft* v. *Tennessee*, 322 U.S. 143, 154; *Haley* v. *Ohio*, 332 U.S. 596, 600; *Turner* v. *Pennsylvania*, 338 U.S. 62, 64.

[17] In a connected case *Johnson* v. *Pennsylvania*, 365 Pa. 303, rev. 340 U.S. 881 (1950), the prisoner was held incommunicado for 5 days before arraignment, and questioned from time to time. He had no lawyer—the state alleging he did not want one and that he did not desire to see friends or relatives. Comparing the questioning of Johnson to that of Turner, the Pennsylvania Supreme Court pointed out that while the two prisoners had been held 5 days, Turner had been subjected to 23 hours of interrogation whereas Johnson had been questioned for a total of only 6 hours during those 5 days—in periods of only 15 minutes to 1½ hours. This Court reversed the conviction in the *Johnson* case *per curiam*, citing *Turner* v. *Pennsylvania*.

days imprisonment at Kilby the holding in *Turner* applies with double effect—if such matters can be calculated in terms of days and hours.

These facts bring the questioning of petitioner squarely within the long line of this Court's decisions which condemn coerced confessions employed to convict of crime.

B

Petitioner Was Denied Due Process of Law When He Was Forbidden To Testify During the State's Case And On Voir Dire To Determine Admissibility Of The "Confessions", Concerning The Fact That They Had Been Coerced.

Evidence that the confessions were coerced, discussed in Part A, supra, comes from State witnesses. To this petitioner sought to add by testifying during the State's case solely on the question of the admissibility of the confessions.

The Court ruled—agreeing with the State's objection—that if petitioner testified on admissibility he would also be required to testify on guilt or innocence. The majority of the Supreme Court of Alabama affirmed on this point—but two justices disagreed on the proposition.

The integrity of a defendant's defense against the admissibility of coerced confessions would be seriously jeopardized—if not destroyed—if the defendant, the one man who knows most about the circumstances surrounding their exaction[18] could not testify on their admissibility. To condition this right on the waiver of another of equal and

[18] "A defendant from whom a confession had skillfully been extorted is generally without practical remedy. The only witnesses to the coercive practices are those who participated in and encouraged them." Bader, "Coerced Confessions and the Due Process Clause" 15 *Brooklyn L. Rev.* 51, 70 (1948).

cognate importance—that of not being required to testify[19] —violates that fundamental fairness which constitutes due process of law.

This question has not been previously decided by this Court, although the issue has been presented in form not ripe for adjudication.[20]

The practice in the state courts appears to be to permit insulated testimony on this particular issue, although perhaps more often than not the issue has not been squarely decided.[21]

The Supreme Court of Alabama majority's reasoning that once a defendant testifies on one point he must answer questions on all (R. 350) is inapposite. Defendant did not propose to testify during his own defense. Nor did he propose to testify on any matter of concern to the jury. He desired to testify on a matter of interest to the judge alone —admissibility, a question of law.

However, the Fourteenth Amendment immunity against

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[19] *Twining* v. *New Jersey*, 211 U.S. 78 (1908) and *Adamson* v. *California*, 332 U.S. 46 (1947) hardly go so far as to hold that a defendant can be required to testify, and it does not appear that any state has adopted such a rule. The holding of these two cases—that a prosecutor may comment on defendant's failure to testify—something which is undoubtedly noticed by the jury at any rate—is not the same as putting the defendant on the stand and requiring him to answer questions under penalty of contempt and perjury.

At any rate, Alabama would not require all defendants to testify—only those who seek to prove that their confessions are coerced.

[20] *Stein* v. *New York*, 346 U.S. 156, 174 (1952). See also *Witt* v. *U. S.*, 196 F2d 285 (C.A. 9th, 1952) where the court held that defendant had not been prevented from testifying for such a limited purpose.

[21] *State* v. *Thomas*, 208 La. 548, 554, 23 So. 2d 212 (1945); *Summerville* v. *State*, 207 Miss. 54, 70, 41 So. 2d 377, 382 (1949); *People* v. *Trybus*, 219 N.Y. 18, 113 N.E. 538 (1916) (the prosecutor had so limited himself); *State* v. *Bouse*, 199 Or. 676, 701, 264 P2d 800, 811 (1953); *State* v. *Jones*, — S.C. —, 91 S.E.2d 1, 4 (1956); *State* v. *Ashdown*, — Utah —, 296 P2d 726, 729 (1956); *State* v. *Johnson*, 226 La. 30, 43, 74 So. 2d 402, 407 (1954).

self-incrimination by coerced confession would become practically meaningless if courts were permitted to impose impediments which would in effect destroy the right. The Supreme Court of Louisiana described the reason for not permitting such conditioning in terms that precisely apply here:

> [I]t would be a simple matter for an unconscionable person to extort from the accused while alone a confession—and thereafter falsely testify that it was given freely and voluntarily. Whereupon the accused would be compelled to take the stand to contradict the witness, thereby subjecting himself to cross examination on the whole case, or he would have to let the extorted confession go unchallenged. Either of these alternatives would do violence at least to the spirit of the [Louisiana] Constitution.[22]

Whatever prophylactic effect the Fourteenth Amendment rule against coerced confessions may have in deterring police officers who may fear losing convictions for overzealous interrogation of prisoners, is vitiated if this qualification is permitted to stand. The prisoner with a criminal record, or with other perhaps less invidious qualities which he might prefer not to display to a jury, becomes the easiest mark for the police in seeking inculpatory statements. Should the defendant seek to attack the voluntariness of the confession, he then opens himself to cross examination from which the state constitution otherwise protects him. Other defendants are immune.

If this rule is permitted to stand defendants who have had confessions coerced from them into evidence will be often practically without remedy to prevent their admission.

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[22] *State* v. *Thomas*, 208 La. 548, 555, 23 So. 2d 212, 214.

II

Petitioner Was Denied Rights Guaranteed By The Fourteenth Amendment When Convicted Following Indictment By A Grand Jury In A County Where No Negro Has Ever Sat On A Grand Jury; Where Negroes Were Included Solely Because Of Race On The Panel From Which Was Chosen The Jury That Indicted Him; And Where Jurors Were Selected On The Basis Of Personal Acquaintance With The Jury Commissioners.

No Negro has ever served on a grand jury in Dallas County, Alabama, notwithstanding that there are more Negroes than whites in the County (R. 89). Prior to the petitioner's indictment the jury rolls were revised and the Jury Commissioners testified that of 1,750 panelists, perhaps 250 Negroes' names were placed on the rolls. This was because they were Negroes, notwithstanding doubt by at least one Commissioner as to their ability (R. 102). There is no evidence that in deliberately selecting these Negroes, those who might claim exemption—i.e., those eligible for service but excusable at their own option—were selected; there were many such Negroes in the county. However, a substantial number of exempt white persons were placed on the rolls.

Moreover, the selection of names was limited to persons known to the Commissioners or known to the persons with whom they were acquainted.

This Court has held in *Cassell* v. *Texas*, 339 U.S. 282:

> An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race. (At p. 287).

This is but part of the larger doctrine that selection for jury service must be impartial and fair and without regard to race.

Alabama law provides an objective and systematic procedure for making up the jury rolls. The statute (R. 342) provides that "The Jury Commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men . . ." Jurors are to be selected by scanning the registration lists, the lists returned from the tax assessor, names in city directories, telephone directories and any and every other source of information from which information may be obtained. 30 Code of Alabama, Section 24. The Jury Commissioners, however, limited themselves to persons whom they knew. They consulted the objective sources only to the extent that they knew the persons therein. In addition, they asked persons whom they knew to submit names. These individuals from whom information was requested included but two Negroes who submitted nothing.

As Mr. Justice Reed pointed out in the *Cassell* case "It may be assumed that in ordinary activities in Dallas County [Texas] acquaintanceship between the races is not on a sufficiently familiar basis to give citizens eligible for appointment as Jury Commissioners an opportunity to know the qualifications for grand-jury service of many members of another race."

The deliberate employment of a system calculated to produce a disproportionately large number of white people cannot meet Fourteenth Amendment standards.

Moreover, as the Statements of Facts indicates, the failure to call a large number of qualified Negroes—who surely come within the definition of "all" qualified persons—solely because they were exempt, was not impartial, when a sub-

stantial number of exempt white persons were included. As Mr. Justice Clark concurring in the *Cassell* case pointed out "The record indicates clearly that there were Negroes qualified and available whom the Commissioners did not know, but whom upon inquiry they should have considered." (At p. 298).

In *Avery* v. *Georgia*, 345 U.S. 559, the late Chief Justice Vinson held "The Jury Commissioners, and the other officials responsible for the selection of the panel were under a constitutional duty to follow a procedure—"a course of conduct" which would not "operate to discriminate in the selection of jurors on racial grounds." The procedure here necessarily operated to discriminate in the selection of persons on racial grounds.

The long history of discrimination against Negroes in the selection of juries—and no Negroes sat on the grand jury which condemned petitioner—requires that the judgment below be reversed. Moreover, the limitation of selection to persons whom Commissioners personally knew or those whom they knew second-hand—not required by Alabama law—incorporated into the jury system a factor which necessarily produced a disproportionately small number of Negroes for jury service in Dallas County.

Those Negroes who were selected were deliberately placed on the jury because of their race.

Such a system clearly violates the mandate of the Fourteenth Amendment which requires that jury selection shall be impartial and fair and that no person shall be included or excluded because of race.

WHEREFORE, for the foregoing reasons it is respectfully submitted that the judgment below be reversed.

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